

**IN THE COURT OF APPEAL  
AT ELDORET**

**(CORAM: WARSAME, MATIVO & GACHOKA,  
JJ.A.) CIVIL APPEAL NO. 42 OF 2020**

**BETWEEN**

**JOSIAH KIPROTICH MAGUT.....APPELLANT**

**AND**

**NATIONAL BANK OF KENYA.....RESPONDENT**

*(An appeal arising from the judgment and decree of the High Court of Kenya at Eldoret (H.A. Omondi, J.) delivered on 29<sup>th</sup> July 2019*

*in*

**HCCC No. 65 of 2006**

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**JUDGMENT OF THE COURT**

1. The main issue in this appeal is whether the appellant and the respondent were at all material times to the dispute in a banker customer relationship. According to the respondent's plaint dated 5<sup>th</sup> June 2006, it had advanced several banking facilities and other financial accommodation to the appellant in furtherance of financing his operations and conducting business.
2. The respondent's claim was that the appellant was in breach of contract and therefore claimed a sum of Kshs.27,697,707.35. The sum emanated from the balance of the amount due on account of monies lent by the respondent to the appellant

together with

interest accrued calculated up to December 1999. The interest was based at the rate of 7% per annum above its base rate, which stood at 15%, totalling 22% from January 2020.

3. In her judgment dated 29<sup>th</sup> July 2020, *Omondi, J.* (as she then was), framed three issues for determination and held in part as follows in finding merit in the respondent's claim:

***"24. WHETHER THERE EXISTED A BANKER-CUSTOMER RELATIONSHIP***

***The Defendant has denied the existence of a Banker-Customer relationship relying on the definition that the relationship is created when the customer opens an account with the bank. However, a perusal of the list of documents from both parties paints a different picture. In the plaintiff's list of documents there is a printout of the details of his account balance which is proof he had an account with the plaintiff. The defendant also executed charge documents and correspondences between himself and the bank. The same have not been challenged or proven to be forgeries. The defendant clearly had a relationship with the Plaintiff.***

***25. WHETHER THE DEFENDANT HAS SETTLED THE OUTSTANDING SUMS.***

***The defendant has not provided any evidence that he has settled any of the sum. The plaintiff provided correspondences between the defendant and themselves where the defendant proposed offers on settlement of the debt. But there is no proof that the defendant attempted to settle the sums at all.***

***26. WHETHER THE PLAINTIFF'S DOCUMENTS WERE***

***PRODUCED AS EVIDENCE.***

**The defendant challenged the admissibility of the documents produced by the plaintiff's (sic) as evidence on the basis that they were not formally produced as exhibits during the hearing. A perusal of the proceedings reveal that they were indeed produced as evidence by PW1 on 17<sup>th</sup> October 2018. This puts to bed the issue of admissibility. The defendants were served with the documents and had a chance to peruse them. They also had a chance to cross examine the witness on the documents after they were produced as evidence and chose not to do so. Section 146 (3) and (4) of the Evidence Act are clear on further cross-examination on new matters introduced in re-examination. Consequently, the Plaintiff's documents were produced as evidence.**

**27. WHETHER THE PLAINTIFF HAS PROVED ITS CASE ON A BALANCE OF PROBABILITIES**

**The Plaintiff has proven that there was a banking relationship between itself and the defendant. It has also proved that there were various facilities provided to the defendant on various dates. The defendant has failed to rebut the evidence produced and also failed to testify or produce any witnesses in his defence.**

**28. From the foregoing, I hold and find that the plaintiff has proven its case on a balance of probabilities. Judgment is therefore entered in favour of the plaintiff against the defendant in the following terms:**

- a) The defendant owes the plaintiff a sum of Kshs. 27,679,707.35cts which is outstanding.**
- b) Intere4st (sic) thereon at 22% per annum.**
- c) Costs of the suit."**

4. It is those findings that precipitated the appellant to file the present appeal. He lodged his notice of appeal dated 29<sup>th</sup> July 2019 on 30<sup>th</sup> July 2019. The appellant also filed his memorandum of appeal dated 17<sup>th</sup> February 2020, which raised seven grounds disputing the findings of the learned judge. We have taken the liberty to summarize the grounds as follows: in his view, no banker customer relationship was proven to have existed and consequently, he was not indebted to the respondent as particularized in the plaint; that the learned judge erroneously relied on documents neither formally produced nor marked for identification by the respondent; that the respondent failed to establish a basis for the award of interest and the existence of a principal amount or any overdraft that had not been repaid and any extent of payment. In its view, the sums were based on non-contractual interest rates, illegal charges, penalties and sundry commissions; and the suit was improperly filed absent a resolution of the respondent. For those reasons, the appellant prayed that the appeal be allowed by setting aside the judgment of the trial court. In its stead, the appellant prayed that the suit be dismissed with costs.
5. During the hearing of the appeal on 21<sup>st</sup> January 2026, both parties were ably represented. Learned counsel Mr. Ogutu

appeared for the

appellant while learned counsel Mr. Maina was present for the respondent. Parties relied on their respective written submissions that were orally highlighted.

6. The appellant filed written submissions, a list of authorities and a case digest, all dated 5<sup>th</sup> March 2024 to persuade this Court why we should allow his appeal. He submitted that since common law has settled that a banker-customer relationship only subsists when a bank agrees to open an account in the name of the customer, it was incumbent upon the respondent to demonstrate that the said action took place. In his view, that did not occur since no account opening forms or proof of the existence of an account held with the respondent in the appellant's name were adduced. Instead, the respondent adduced a charge that did not prove the existence of this relationship. It is instructive to point out at this juncture that the relationship between the appellant and the respondent was not contested by counsel when arguing the appeal.
7. Secondly, learned counsel for the appellant extensively submitted that the respondent never adduced documents in support of its case to the required standard. In his view, this was the fulcrum of the appeal. That from the record and during the evidence taking of the respondent's witness, he argued that the

witness neither

marked any document for identification nor were they produced by consent during the witness' examination in chief.

8. Acknowledging that the same took place during re-examination, learned counsel submitted that the same was untenable as the witness had already been cross examined by the appellant. In his interpretation of the actions, this was a failure to produce the documents leading to the conclusion that no documents were adduced in support of the respondent's case. Therefore, those documents were of little or lacked any probative value. His conclusion was that accordingly, the respondent failed to prove its case on a balance of probabilities, the absence of the appellant's evidence notwithstanding. For those reasons, the trial court ought to have dismissed the respondent's case. For those reasons, he prayed that the appellant's appeal be allowed with costs.

9. The respondent opposed the appeal vide its written submissions dated 20<sup>th</sup> January 2026. Learned counsel submitted that from a cursory perusal of the appellant's amended statement of defence, it was admitted that he operated account number 401032221 with the respondent. Further, that the appellant admitted that he offered his properties as security which were sold but the proceeds were unaccounted for. That since

parties were bound by their

pleadings, the appellant could not depart from that admission. In his view, learned counsel submitted that this aptly proved the existence of a banker-customer relationship with the parties.

10. On whether the respondent adduced documents in evidence at trial, learned counsel submitted in the affirmative. He pointed out that through the respondent's witness one Paul Chelanga, the documents were admitted in evidence without any objection. This invited the trial court to evaluate the documents and establish their probative value. He submitted that the respondent produced bank statements in evidence and therefore, the onus was on the appellant to disprove their veracity. That did not take place thereby establishing that the documents ably proved the respondent's case on a balance of probabilities. In his view, the trial court properly arrived at a correct decision.
11. Lastly, speaking to the objections raised insofar as there was no resolution to file suit, learned counsel submitted that the verifying affidavit of Damaris Gitonga was never challenged yet it confirmed instructions to file suit. Secondly, he argued that the appellant failed to take cognizance of the fact that the respondent, as a bank, operated on corporate governance frameworks governing the appointment of external counsel.

He submitted that the firm of

advocates were properly instructed to come on record for the respondent on the basis of the banking structure. Be that as it may, the issue of the respondent's authority was not raised at trial by the appellant, despite his participation. In view of the foregoing, learned counsel prayed that the appeal be dismissed with costs.

12. This is a first appeal. This Court's duty as a first appellate court has been settled by a wealth of authorities. *Sir Kenneth O'Connor* stated as follows in the Court of Appeal for East Africa case of ***Peters vs. Sunday Post Limited*** [1958] EA 424:

***“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1) {1947} A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial judge.*”**

***For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which***

***the powers of the Court of Appeal are limited to deciding a question of Law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of Law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given.”***

13. Therefore, this Court will not interfere with a finding of fact unless it can be demonstrated that the trial court took into account extraneous issues or did not take into account crucial

issues or

that the trial court arrived at an incorrect finding not based on evidence.

14. From the record before us, it is discernible that only the respondent called a witness to the stand. According to **PW1** Paul Chelanga, the accounts manager in the legal and remedial department of the respondent, two charges were created in favor of the respondent over the appellant's properties. The first charge was secured by the property namely **Uasin Gishu/Kimumu/662**. It was executed by both parties on 20<sup>th</sup> May 1993 and registered on 26<sup>th</sup> May 1993. The charge instrument secured the payment of the sum of Kshs.300,000.00 with an interest rate of 24% per annum.
15. The second charge was secured by all that property namely **Uasin Gishu/Kimumu/659**. The charge instrument was executed by the parties herein and registered on 9<sup>th</sup> May 1994, securing the payment of the sum Kshs.150, 000.00 with an interest rate of 50% per annum.
16. On 21<sup>st</sup> May 1994, the appellant wrote to the respondent requesting for an extension of overdraft banking facilities. The appellant requested the respondent to recharge the aforementioned properties as security for the overdraft facilities. Vide a letter dated 23<sup>rd</sup> May 1994, the respondent

intimated to the appellant that it

was not averse to the request and granted an overdraft limit of Kshs.1,300,000.00. An interest rate of 30% per annum was applied for a period of one year. According to the repayment terms, the facilities were repayable on demand and the respondent reserved the right to call up any outstanding balance at any time without notice.

17. **PW1** further testified that the respondent advanced a term loan to the appellant of Kshs.1,230,190.00 at a 28% interest rate per annum. This was effected vide a letter dated 21<sup>st</sup> December 1995. The loan was intended to enable the appellant purchase a residential **Plot PDP ELD No. 17/95/318, Plot No. 13/79** and **Plot No. 372** Eldoret. The title documents acted as security for the executed agreement.
18. **PW1**'s further evidence was that on several occasions, the respondent sought to recover the sums owed by the appellant. He recalled that a statutory notice was issued on 1<sup>st</sup> September 1997 through the firm of M/s Nyaundi Tuiyott & Company Advocates. The same disclosed to the appellant that the respondent reserved the right to exercise its statutory power of sale.
19. On 9<sup>th</sup> September 1999, the appellant wrote to the respondent proposing to pay Kshs.20,000,000.00 in full and final payment

of

his debts. The respondent accepted the proposal vide a letter dated 8<sup>th</sup> December 1999. However, the appellant never honoured his promise. This galvanized the respondent to issue a statutory notice dated 22<sup>nd</sup> January 2004 with intent to sell the appellant's properties by way of public auction. This prompted the appellant to make another proposal in his letter dated 16<sup>th</sup> March 2004. **PW1**'s testimony was that once more, the appellant failed to honour its part of the bargain.

20. In view of the foregoing, a public auction was conducted by Joyland Auctioneers on 19<sup>th</sup> November 2004. The proceeds of the sale settled part of the debt owed. **PW1** testified that at the time of filing suit, the appellant was indebted to the respondent in the sum of Kshs.27,697,707.35 hence the suit. He urged the trial court to award interest at the rate of 22% per annum comprised of a 15% base rate and 7% interest rate from January 2000 until payment in full.
21. From the record and the submissions before this Court, only two issues call for our determination. One of the issues raised in this appeal was whether the documents relied on by **PW1** in evidence were adduced and marked for identification. When this matter was heard on 17<sup>th</sup> October 2018, **PW1** stated in his cross examination

that: ***“I produce the entire bundle of documents as evidence, I kept referring to them as our bundle.”*** During re-examination, **PW1** further urged the trial court to allow him adopt the list of documents as evidence from the bank alongside his written statements. It was here that learned counsel for the appellant stated: ***“Those documents have not been produced.”***

22. The learned judge made a finding on this issue stating that admissibility of the documents by the respondent was satisfactory. A cursory perusal of the proceedings reveal that the respondent’s sole witness applied that its bundle of documents, which had already being filed, be produced in evidence. The proceedings also show the witness was not cross examined on those documents. But there is no indication that the appellant was denied the right to cross examine the witness on any issues arising from the bundle of documents. We note that the trial court further made reference to section 146 (3) of the Evidence Act which provides as follows:

***“The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”***

23. We are of the view that the appellant was not impeded by any reason whatsoever from cross examining the witness on the

documents he produced when he was taking evidence. We therefore find that the learned judge properly analyzed this issue as no miscarriage of justice was occasioned. The appellant ought to have been diligent enough to cross examine the witness on the documents produced while on the dock. He elected not to do so. The arguments raised herein are splitting hairs with no reasonable ground to challenge the production of those documents. We therefore find that this ground of appeal must fail.

24. The second issue was whether the respondent proved its case on a balance of probabilities and thus succeeding in the claim as pleaded in its plaint. As already stated, the appellant called one witness who gave cogent evidence on the bank client relationship, the borrowing of the money by the appellant, the charging of the properties as security, the default in payment, the issuance of the statutory notices and the subsequent sale of the charged properties which did not realize the full outstanding debt.
25. That evidence was not dislodged by the appellant in any way.

Further, having established that the documents were produced in court and properly relied on, we find that overwhelming and

uncontroverted evidence was adduced by the respondent as to demonstrate that a banker-customer relationship subsisted

between the parties, a fact admitted by the appellant's counsel during the hearing of this appeal. The appellant was duty bound by the terms and conditions precedent insofar as the facilities granted to him by the respondent were concerned.

26. It is clear from the record that the appellant obtained several banking facilities and remained indebted to the respondent. Furthermore, the appellant failed to lay any credible challenge to the respondent's case. The evidence was unchallenged and unrebutted. A court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud, undue influence, or material mistake are pleaded and proved. It is ordinarily no part of equity's function to allow a party to escape from a bad bargain however, Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive. In the present matter, the appellant has pleaded and proved none of these exceptional circumstances. The contracts stand on their terms. The appellant is bound by these contracts and must honour them as written. [See ***National Bank Kenya Ltd vs. Pipeplastic Samkolit (K) Limited and another*** [2002] 2EA 503

27. We accordingly find that the appellant was bound by the terms of agreements between the parties. He was therefore duty bound to honour his obligations having entered the agreements consciously. We thus apply the ruminations of *Lord Clarke* in the case of **RTS Flexible Systems Ltd vs. Molkerei Alois Müller GmbH** [2010] 1 WLR 753 at [45], [2010] UKSC 14 that held as follows:

***“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the***

28. Having perused the documents and the correspondence between the parties, there is no doubt that the appellant borrowed money and that he defaulted in payment. Otherwise, why would he even make proposals on repayment of the outstanding arrears. Why would he sign charge documents in the first place? The charged properties were sold but failed to realize the amount owing and this meant that the appellant

was still indebted as held by the trial

judge. It is also clear that the title to the charged properties was processed, signed and executed by the appellant.

29. We think we have said enough to show that all the grounds of the appeal have no merit. We agree with the learned judge that the amount claimed by the respondent was due and the grounds of appeal are just but a desperate attempt to clutch on straws.

30. It is for the above reasons that we do not hesitate to find that the present appeal herein lacks merit. It must suffer its fate. It is hereby dismissed with costs to the respondent.

**Dated and Delivered at Nakuru this 19<sup>th</sup> day of March, 2026.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

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....  
**JUDGE OF APPEAL**

*I certify that this is a true  
copy of the original.*

**Signed**  
**DEPUTY REGISTRAR**